

Nebraska Law Review

Volume 34 | Issue 3

Article 11

1955

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Hal Bauer

University of Nebraska College of Law

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Recommended Citation

Hal Bauer, *Remedies of Lessee in Nebraska When Demised Premised Are in Possession of a Wrongful Occupier*, 34 Neb. L. Rev. 546 (1954)
Available at: <https://digitalcommons.unl.edu/nlr/vol34/iss3/11>

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REMEDIES OF LESSEE IN NEBRASKA WHEN DEMISED PREMISES ARE IN POSSESSION OF A WRONGFUL OCCUPIER

Normally a lessee encounters few if any legal difficulties in gaining possession of the leased premises on the date his term begins. If, however, a prior tenant or other person in possession prevents the lessee from taking possession, the latter must bring an action against either the lessor or the occupier to obtain relief. The purpose of this article is to examine the remedies available in Nebraska to the lessee who seeks (1) to obtain possession of the demised premises and (2) to obtain damages for the time he was denied possession.

I. Remedies To Gain Possession

A. EJECTMENT

The usual remedy of a lessee to gain possession of the leased

premises from a wrongful occupier is ejectment. This action as developed at common law and modified in most states by statute is based on the right of the lessee to possession of the premises. It is generally agreed that ejectment will lie in favor of the lessee against a wrongful occupier without an entry on the demised premises by the lessee.¹

In Nebraska a plaintiff bringing the statutory action of ejectment² must show that he possesses a legal estate in the premises, that he is entitled to possession, and that the defendant is unlawfully keeping him out of possession.³ A lessee is a proper party to bring the action.⁴

B. FORCIBLE ENTRY AND DETAINER

At common law this remedy was available to regain possession of the premises from one who had forcibly entered and ejected the plaintiff. The cause of action was based on the wrongful interference with the plaintiff's possession by the use of physical force. In this action the question of title or right of possession was not involved and could not be tried. It was immaterial in what capacity the plaintiff had been in possession.⁵ In its original form the action had to be sustained by evidence of actual possession in the plaintiff at the time of the entry.⁶

In Nebraska the common law action has been enlarged by statute.⁷ The gist of the plaintiff's case can be simply that the

¹ *Ewert v. Robinson*, 289 Fed. 740 (8th Cir. 1923). See Note, L.R.A. (n.s.) 54, 56 (1918A).

² Neb. Rev. Stat. §§ 25-2124-25-2128 (Reissue 1948).

³ *Reams v. Sinclair*, 97 Neb. 542, 150 N.W. 826 (1915); *Bridenbaugh v. Bryant*, 79 Neb. 329, 112 N.W. 571 (1907); *Dale v. Hunneman*, 12 Neb. 221, 10 N.W. 711 (1881); Neb. Rev. Stat. § 25-2124 (Reissue 1948) provides, "...in an action for the recovery of real property, it shall be sufficient if the plaintiff states in his petition that he has a legal estate therein, and is entitled to the possession thereof, describing the same, and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived."

⁴ *Dale v. Hunneman*, 12 Neb. 221, 10 N.W. 711 (1881).

⁵ *Emsley v. Bennett*, 37 Iowa 15 (1873).

⁶ *Vincent v. Brant*, 101 Mich. 60, 59 N.W. 421 (1894).

⁷ Neb. Rev. Stat. § 26-1,121 (Reissue 1948) provides, "The municipal court shall have power to inquire, in the manner hereinafter directed, as well against those who make unlawful and forcible entry into lands and tenements, and detain the same, as against those who, having a lawful and peaceable entry into lands or tenements, unlawfully and by force hold the same. If it is found, upon such inquiry, that an unlawful and forcible entry has been made, and that the same lands or tenements are held by

defendant is unlawfully detaining possession from him. The remedy is available even though the defendant has not expelled the plaintiff by force, and it is immaterial that the plaintiff has never been in possession.⁸ A lessee having the right to possession is therefore a proper party to maintain the statutory action for unlawful detainer against any person unlawfully detaining the premises.⁹ The forcible entry and detainer statute provides a summary remedy since the ordinary rules of pleading and practice which govern the action of statutory ejectment in the district court¹⁰ do not apply.¹¹

C. INJUNCTION

The equitable remedy of injunction cannot be used merely to gain possession. It is axiomatic in equity jurisprudence that this remedy cannot be pursued solely to try title or to transfer possession of real property from the wrongful occupier to the lessee, when the lessee has an adequate remedy at law.¹² However, the court will frequently deliver possession as auxiliary to other relief.¹³

II. *Damages For Loss Of Possession*

A. AGAINST THE LESSOR

There are two general rules concerning the duty of a lessor to put the tenant in possession. Under the so-called "American rule" there is no implied covenant by the lessor to put the lessee in possession as against a third party occupant. The lessor impliedly covenants only that possession shall not be withheld by one having a paramount title.¹⁴ The other line of authority following the "English rule" holds that the lessor impliedly covenants that the premises shall be both legally and actually open to the lessee on the day the term begins.¹⁵ Nebraska follows the "Eng-

force, or that the same, after a lawful entry, are held unlawfully, then the court shall cause the party complaining to have restitution thereof." Neb. Rev. Stat. § 27-1401 (Reissue 1948) (similar jurisdiction given to justices of the peace).

⁸ Gregory v. Pribeno, 143 Neb. 379, 9 N.W.2d 485 (1943).

⁹ Gregory v. Pribeno, 143 Neb. 379, 9 N.W.2d 485 (1943); Brown v. Feagins, 37 Neb. 256, 55 N.W. 1048 (1893).

¹⁰ See note 2 supra.

¹¹ Sporer v. Herlick, 158 Neb. 644, 64 N.W.2d 342 (1954).

¹² Hollinrake v. Neeland, 94 Neb. 530, 143 N.W. 809 (1913).

¹³ See Note, 12 A.L.R.2d 1186, 1201 (1950).

¹⁴ See Note, 70 A.L.R. 141, 151 (1931).

¹⁵ Ibid.

lish rule" that the lessor has a duty to oust anyone in wrongful possession of the premises when the lessee's term begins.¹⁶

The measure of *general* damages for a breach of the implied covenant to put the lessee in possession is the excess, if any, of the rental value of the premises for the term demised over the rent agreed upon in the lease.¹⁷

The lessee may also recover *special* damages that can be shown to have necessarily resulted from the breach of the agreement.¹⁸ Special damages have been awarded for the extra costs of maintaining a family and loss of time during pendency of forcible detainer proceedings;¹⁹ expenses incurred in leasing other land and the added cost of moving thereto;²⁰ liability to sub-lessees, and hiring of an architect to make plans for altering premises;²¹ and salaries of employees and extra expense in handling merchandise.²² In leases of business property, loss of profits has been held to be a proper element of damages when foreseeable and capable of being measured with reasonable certainty.²³ Many decisions have denied recovery of "lost profits" for the reason that if the business of the lessee is not an established one, the loss is conjectural.²⁴ In contrast to the situation with respect to leases of business property, it is generally held under leases of farm lands that the lessee is entitled to recover as special damages the loss of any profits he might have earned from the land.²⁵ Nebraska courts have refused to award damages for loss of farm profits to a lessee denied possession because the profits are too speculative.²⁶

¹⁶ *Herpolsheimer v. Christopher*, 76 Neb. 352, 107 N.W. 382. *aff'd* on rehearing, 76 Neb. 355, 111 N.W. 359 (1907).

¹⁷ *Sibert v. Hostick*, 91 Neb. 255, 135 N.W. 1054 (1912); *Herpolsheimer v. Christopher*, 76 Neb. 355, 111 N.W. 359 (1907); *Shutt v. Lockner*, 77 Neb. 397, 109 N.W. 383 (1906). If the rent reserved in the lease were \$1000 and the rental value of the premises for the term demised were found to be \$1500, then the damages would be \$500. The rental value is sometimes expressed as the "fair value of the use of the premises."

¹⁸ *Ibid.*

¹⁹ *Herpolsheimer v. Christopher*, 76 Neb. 355, 111 N.W. 359 (1907).

²⁰ *Sibert v. Hostick*, 91 Neb. 255, 135 N.W. 1054 (1912).

²¹ *Darling Shops Inc. of Tennessee v. Brack*, 95 F.2d 135 (8th Cir. 1938).

²² *Bennett v. Weinberger*, 160 La. 1001, 107 So. 780 (1926).

²³ See Note, 104 A.L.R. 129, 157 (1936).

²⁴ *Alexander v. Bishop*, 59 Iowa 572, 13 N.W. 714 (1882); *Walter Box Co. v. Blackburn*, 157 S.W. 220 (Tex. Civ. App. 1913).

²⁵ *Stewart v. Murphy*, 95 Kan. 421, 148 Pac. 609 (1915).

²⁶ *Jarman v. Sexton*, 130 Neb. 453, 264 N.W. 305 (1936); *Phillips v. Bossung*, 108 Neb. 658, 189 N.W. 172 (1922); *Shutt v. Lockner*, 77 Neb. 397, 109 N.W. 383 (1906).

B. DAMAGES AGAINST THE OCCUPIER

(1) Trespass

The action for direct trespass to land, in the nature of the common law action of *trespass quare clausum fregit*, may be maintained by a person in possession of the land at the time of a wrongful entry regardless of the nature of his holding. Thus it may be maintained by any tenant of land against one who shows no title or other right superior to his own. It is the general rule that as against any third person who trespasses on his possession, the lessee has a right to a direct suit²⁷ and it is immaterial (except as to the measure of damages) whether the plaintiff held under a lease, or at will, or even at sufferance.²⁸ The basis of the action is the injury to his right of possession. But in order to maintain an action of trespass the plaintiff must have been in possession of the land at the time of the trespass.²⁹ The requirement of possession may in some circumstances be satisfied by a constructive possession.³⁰ A lessee who has never been in possession, however, cannot create even a constructive possession in the face of an actual possession by the wrongful occupier.³¹ Thus, the requirement of possession—actual or constructive—appears to make it impossible for a lessee never in possession to obtain damages in trespass from a person in actual possession of the premises.

No Nebraska cases have been found which concern a lessee who was not in possession, and who recovered against a trespasser. The rule in Nebraska seems to be in accord with the general rule that in order to maintain an action of trespass to land a plaintiff who is not the owner of the land must have been in possession at the time the acts complained of were committed.³² If it were possible for the lessee out of possession to bring an action of trespass against the occupier, presumably the plaintiff

²⁷ *Kellogg v. King*, 114 Cal. 378, 46 Pac. 166 (1896); *Garrett v. Sewell*, 95 Ala. 456, 10 So. 226 (1891).

²⁸ See Note, 12 A.L.R.2d 1186, 1203 (1950).

²⁹ *Boulton v. Telfer*, 52 Idaho 185, 12 P.2d 767 (1932); *Munsey v. Hanly*, 102 Me. 423, 67 Atl. 217 (1907); *Clay v. City of St. Albans*, 43 W. Va. 539, 27 S.E. 368 (1897).

³⁰ *First Nat'l Bank of Albuquerque v. Town of Tome*, 23 N.M. 255, 167 Pac. 733 (1917); *Callagan v. American Trust and Saving Bank*, 196 Ill. App. 102 (1915).

³¹ *Littleton v. Roberts*, 181 S.C. 303, 187 S.E. 349 (1936); *Kossell v. Rhoades*, 272 Pa. 75, 116 Atl. 56 (1922).

³² *Hanlon v. Union Pacific Ry.*, 40 Neb. 52, 58 N.W. 590 (1894); *Chicago R. I. & P. Ry. v. Shepherd*, 39 Neb. 523, 58 N.W. 189 (1894); *Nelson v. Jenkins*, 42 Neb. 133, 60 N.W. 311 (1894).

would be entitled to recover such an amount as would compensate him for the loss which he sustained in consequence of the defendant's wrongful act.³³

(2) Trespass for Mesne Profits

Mesne profits are the pecuniary benefits received by one who dispossesses the owner of land between the wrongful entry and the restoration of possession. An action for mesne profits springs from a trespass and tortious holding. It is an emanation from the action of ejectment and can be brought after the right of possession of the plaintiff has been established by a judgment in ejectment. The damages for the use of the property while a trespass is continued thereon is measured by the reasonable rental value of the property.

The Nebraska statutes have substituted for the action of trespass for mesne profits an action which is described as a claim for damages for the withholding of real property, and for the rents and profits.³⁴ The statute provides that claims to recover real property, with or without damages for the withholding thereof, may be united in one petition in an action for the loss of rents and profits of the real property.³⁵ An action for ejectment and an action for rents and profits may be joined.³⁶ A lessee who has never been in possession can bring the action of ejectment³⁷ and can recover the rents and profits enjoyed by a wrongful occupier during the lessee's term.

(3) Interference with Right of Contract

A recent Ohio case presents a novel approach which may be available to the lessee.³⁸ In this case the lessee brought an action against the former tenant to recover damages sustained by reason of his wrongful holding over and refusal to vacate the premises which had been leased by the owner to the lessee. It was held that the lessee had a cause of action *ex delicto* for wrongful interference with the contractual relationship and could recover such damages which were the natural result of the tenant's wrong-

³³ *Shiverick v. R.J. Gunning Co.*, 58 Neb. 29, 78 N.W. 460, rev'd on rehearing, 59 Neb. 73, 80 N.W. 264 (1899).

³⁴ *Fletcher v. Brown*, 35 Neb. 660, 53 N.W. 577 (1892); *Harral v. Gray*, 12 Neb. 543, 11 N.W. 851 (1882).

³⁵ Neb. Rev. Stat. § 25-701 (Reissue 1948).

³⁶ See note 34 *supra*.

³⁷ *Dale v. Hunneman*, 12 Neb. 221, 59 N.W. 421 (1894).

³⁸ *Reichman v. Drake*, 89 Ohio App. 222, 100 N.E.2d 533 (1951).

ful acts. The court relied on Section 766 of the Restatement of Torts³⁹ which states:

....one who, without privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) to enter into or continue a business relation with another is liable to the other for the harm caused thereby.

The court applied this section by reasoning that the old tenant interfered with the contractual relations between the plaintiff and the landlord in that it became impossible for the lessor to place the lessee in possession on the commencement date of the term as contemplated by the parties. In measuring damages the court quoted the following rule:

As a general rule the reasonable and necessary expenses incurred in good faith, in anticipation of performance, or in part performance, of a contract, may be recovered as a part of the damages for its breach, especially where the breach consists in preventing performance.⁴⁰

Nebraska has never applied the interference-with-the-right-of-contract rule in a similar situation. Because of the difficulty in bringing an action of *trespass quare clausum fregit* and the possible limitations regarding special damages in an action for rents and profits a lessee out of possession might use this theory as an alternative. The fact that Nebraska places an implied covenant on the lessor to put the lessee in possession would indicate that the court tends to favor the lessee's rights. This adds weight to the possibility that the Nebraska courts would accept the interference with the right of contract theory.

Conclusion

The type of remedy to which the lessee will resort will depend on his particular situation and need for the premises. Such factors as the availability of other similar premises, seriousness of delay during pendency of the suit and difficulty of moving from one premise to another will influence his decision as to whether he should bring action against the lessor or the occupier and the type of action to bring.

Though Nebraska follows the rule that the lessor impliedly covenants to put the lessee in possession, the lessee should stipulate in the lease, if he is in position to do so, that the lessor will give actual possession free of third parties.

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³⁹ Restatement, Torts § 766 (1939).

⁴⁰ 15 Am. Jur. 545. See *Guerini Stone Co. v. Carlin Contr. Co.*, 248 U.S. 334 (1919).